No. 13,118

IN THE

United States Court of Appeals

For the Ninth Circuit

CECIL LEE DAVIDSON, also known as Jack Reynolds,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF JURISDICTION.

By indictment filed in the United States District Court for the Northern District of California, Southern Division, appellant and others were charged with the crime of conspiracy, within the jurisdiction of that court, in violation of 18 U.S.C., sec. 371, and 18 U.S.C., sec. 2401. CT 1-3. The District Court had jurisdiction. 18 U.S.C., sec. 3231; Rule 18, Federal Rules of Criminal Procedure. On conviction thereof appellant was sentenced to imprisonment and fined by final judgment made and entered August 23, 1951. CT 168-169. Notice of appeal to this court was filed August 23, 1951. CT 173. The appeal was timely. Rule 37(a), Federal Rules of Criminal Procedure.

Jurisdiction of this court to review the final judgment of the District Court is sustained by 28 U.S.C., secs. 1291, 1294.

STATEMENT OF THE CASE.

The indictment (CT 1-3), presented in open court on April 18, 1951 (CT 3), charged that "on or about January 27, 1951, and continuously thereafter up to and including the 12th day of April, 1951", Edward J. Carrigan, Ray Calmes, Sam Neider, and this appellant, as defendants, conspired together and with Phil Davis and John Church, to defraud the United States in the exercise of its governmental functions by unlawfully attempting to influence, obstruct, and impede the Attorney General and the Bureau of Prisons in the designation of the places of confinement and transfer where Phil Davis, a Federal prisoner convicted of violating the Motor Boat Act of 1940 was to serve his sentence of six months imprisonment. CT-2. Five overt acts occurring between January 27, 1951, and April 12, 1951, were alleged, each overt act being directed at a separate defendant. The overt act ascribed to this appellant was as follows (CT 3):

> "3. On or about February 10, 1951, said Phil Davis had a conversation with said defendant Jack Reynolds near the Union Club of Oakland, 285-23rd St., Oakland, California."

At the conclusion of the government's case the court granted a judgment of acquittal in favor of defendant Neider, on July 30, 1951. CT 12-13. Ap-

pellant's motion was denied. RT 737-739. The jury found defendants Carrigan and Calmes and this appellant guilty on August 4, 1951. CT 151. Appellant's motion for new trial (CT 154-156) was denied August 23, 1951. CT 162. By Judgment and commitment on August 23, 1951, appellant was sentenced to imprisonment for 3 years and fined $3000. CT 168-169. His notice of appeal was filed the same day. CT 173.

The record is voluminous and includes eleven volumes, the first volume containing the clerk's transcript (CT) and the other volumes containing the reporter's transcript (RT). The facts are long and involved and hardly susceptible of condensing within the scope of a proper statement of the case. And various factors increase the difficulty where, as here, the statement of the case is on behalf of one of the defendants.

One factor is that part of the testimony came into the record under rulings of the court limiting it to the case against defendants other than this appellant. This is particularly true of testimony given by Church, an alleged conspirator, who appeared as the first witness for the government and testified at length concerning statements and declarations made to him by various defendants. Another factor is that testimony of government witnesses Church and Davis, another alleged conspirator, respecting statements and declarations made by defendant Neider was expunged as evidence by a ruling of the court at the time

Neider's motion for judgment of acquittal was granted. RT 741-742. And still another factor is that testimony of government witnesses respecting alleged statements and declarations of defendant Carrigan after he was apprehended was limited by rulings of the court to the case against defendant Carrigan. RT 665.

At the outset, a brief introduction to the personnel of the alleged conspiracy or conspiracies, and a brief insight into the inter-acquaintanceships of the alleged conspirators, may be of some assistance to the court.

Phil Davis, named as a conspirator but not as a defendant (CT 1-3) lived in Alameda County and owned an automobile agency in Oakland. RT 227-228. By judgment and commitment dated November 7, 1949, the United States District Court, at Sacramento, sentenced him to imprisonment for six months for violating the Motor Boat Act of 1940 (46 U.S.C., sec. 526), the offense charged being that of reckless and negligent operation of a motor boat. RT 17-18. The offense was a misdemeanor (46 U.S.C., sec. 526m), and Davis could not be imprisoned therefor in a penitentiary without his consent (18 U.S.C., sec. 4083). Permissible allowances on the term of the sentence would reduce it to 5 months. 18 U.S.C., sec. 497.

On November 29, 1949, and responsive to application by Davis' attorney, the Director of Prisons telegraphed from Washington to John H. Roseen, acting United States Marshal at San Francisco, approving

service of this sentence in a local jail. RT 145. With a different attorney representing him, Davis prosecuted an appeal from the judgment of conviction. This court affirmed the judgment on December 11, 1950. *Davis v. United States,* 9 Cir., 185 F. 2d 938. The Supreme Court denied a petition for writ of certiorari on February 26, 1951. *Davis v. United States,* 340 U.S. 932, 71 S.Ct. 495. On March 7, 1951, Davis began serving his sentence in one of the Alameda County jails, namely, the Santa Rita prison farm, rehabilitation or correction center. RT 18. He was still serving it when this action was tried. RT 228.

Davis never met defendant Carrigan before the trial of this action. RT 342. They had no conversation or discussion respecting the Davis case or any of its phases. RT 234. Davis met defendant Calmes when the latter, as deputy marshal, arrested Davis on the charge of violating the Motor Boat Act of 1940. RT 228. They had met on an earlier occasion. RT 228. Davis again met Calmes when the latter bought an automobile from the Davis agency in 1949 or 1950. RT 229. Prior to January 27, 1951, they had conversed about the Davis case and the possible imprisonment facing Davis. RT 277. A continuing social and business friendship had existed between Davis and defendant Neider for 25 years. RT 234, 342. From the inception of the Davis case, Davis discussed all its phases with Neider and sought his advice and assistance. RT 1046-1060. Davis had met defendant Reynolds, this appellant, sometime after 1949, and

was "very, very slightly" acquainted with him. RT 349. They had no conversation or discussion respecting the Davis case or any of its phases until February of 1951. RT 237.

John Church (John L. Church, RT 19), named as a conspirator but not as a defendant, lived in Alameda County and became manager of the Davis automobile agency on March 1, 1949. RT 19. He had previously been assistant vice president of a bank and vice president of a finance company. RT 137. He had known Davis since 1932. RT 138. He became acquainted with defendant Carrigan on January 27, 1951, when defendant Calmes brought defendant Carrigan into the Davis agency as a prospective purchaser of an automobile. RT 24. Church became acquainted with Calmes in April of 1949. RT 19. He again met him in 1950 when Calmes bought an automobile from the Davis agency. RT 20. They discussed the imprisonment phase of the Davis case shortly before January 27, 1951. RT 22. Church became acquainted with defendant Neider when the latter bought an automobile from the Davis agency shortly after March 1, 1949. RT 29. Their first discussion of the imprisonment phase of the Davis case occurred on March 7, 1951. RT 29. Church did not become acquainted with defendant Reynolds, this appellant, until March 23, 1951, and they had no discussion of the imprisonment phase of the Davis case before that time. RT 42-43.

Defendant Edward J. Carrigan lived in San Francisco and was the United States Marshal at San Francisco. RT 707. He was appointed to that office by

the President on August 11, 1950. RT 797. He had no prior connection with the Marshal's office. RT 797. At one time he was postmaster of the City of San Mateo. RT 798. He became acquainted with his deputy, defendant Calmes, on taking office as Marshal. RT 798. He never saw defendant Neider or talked with him until after April 12, 1951. RT 1044-1045. Up to January 27, 1951, he had met defendant Reynolds on two occasions—once at a labor convention in Los Angeles in 1949, and once at a Jefferson-Jackson Day Dinner in San Francisco on April 9, 1950. RT 798-799, 1201-1202. Between January 27, 1951, and April 12, 1951, he did not see defendant Reynolds or talk to him. RT 881. In his candidacy for United States Marshal, defendant Carrigan was opposed by defendant Reynolds who supported a rival candidate. RT 882.

Defendant Ray Calmes (Raymond J. Calmes, RT 961) was a resident of Alameda County, and a deputy United States Marshal. RT 961. He had served in that capacity for 8 years and was assigned to east bay territory. RT 961. He had a civil service status. RT 455-456. He also operated a grocery store in Oakland. RT 1028. He did not become acquainted with defendant Neider or defendant Reynolds until after April 12, 1951. RT 997-998, 1045. He did not see defendant Neider or defendant Reynolds or talk with either of them between January 27, 1951, and April 12, 1951, or at any other time or times. RT 997-998, 1045.

Defendant Sam Neider (Samuel R. Neider, RT 1042) lived in San Francisco, and was a real estate

and investment operator in the bay area. RT 1042-1043. As stated, a continuing social and business friendship had existed between Davis and Neider for 25 years, and from the inception of his case Davis had sought the advice and assistance of Neider on every phase thereof. Neither had a speaking acquaintance with defendant Reynolds running over 15 years. RT 1201. In September or October of 1950, they became business associates in an Oakland business venture known as the Union Club. RT 1043-1044.

This appellant, defendant Jack Reynolds (Cecil Lee Davidson, RT 1194) lived in Alameda County. RT 1197. His true name was Cecil Lee Davidson. RT 1196. As a boxer, early in his career, he had adopted the name Jack Reynolds as more appropriate. RT 1197. The name Jack Reynolds persisted and appellant has used no other for over 30 years. RT 1196. He was business manager or agent of the Alameda County Building Trades Council whereof all construction unions were members. RT 1197-1199. His office is in the Labor Temple in Oakland. RT 1200. The nature of his work is that of public relations counsel. RT 1199. On behalf of labor, he was active in national, state, and local politics. RT 1202, 1215. Appellant also operated the Union Club across the street from the Labor Temple on premises leased from defendant Neider on a percentage basis. RT 1043-1044.

Appellant Reynolds' first contact with the Davis case was before that case went to trial. RT 1208. He was then asked by Neider if he could give advice or assistance to Davis, and appellant answered that he

could not. RT 1208-1209. Another contact with the Davis case occurred late in November of 1949. RT 1211. Davis had then been convicted and his case had reached the appeal stage. Neider asked appellant to recommend an attorney for Davis on appeal as Davis was dissatisfied with the attorney representing him. RT 1047-1049, 1211-1212. Appellant made such recommendation and Davis employed the attorney. RT 1049-1052, 1212-1213. Appellant's next contact with the Davis case was early in February of 1951. RT 1222-1223. The case had then reached the certiorari stage and was pending in the Supreme Court. Neider asked appellant if he thought it possible to arrange for Davis to serve his sentence in a local jail if he had to serve it. RT 1222-1223. Reasons favorable to Davis were discussed and appeared strong. RT 1059. A few days later appellant told Neider he thought it would be easy to make such arrangement, that the matter would have to be handled through Washington, and that the expense would be $1000. RT 1231-1232. In the interval, appellant had conferred with Augustine F. Gaynor, a member of the Brotherhood of Railroad Clerks, and an experienced Legislative representative in appellant's opinion, and had reached an agreement whereby Gaynor was to go to Washington if and when notified by appellant and if and when expenses of $1000 were paid with the objective of presenting a showing on behalf of Davis and obtaining the consent of the Bureau of Prisons to Davis serving his sentence in a local jail. RT 1226-1230, 1397-1405.

Appellant was not advised at any time of the telegram from the Director of Prisons on November 29, 1950, or that the Director had already given his approval to imprisonment of Davis in a local jail. RT 1213.

The tenor of the Neider-Reynolds conversation last mentioned was relayed by Neider to Davis and Davis approved it. RT 1061-1062. At least three conversations between Davis and appellant followed. It is certain from the record that none of the Davis-Reynolds conversations occurred later than March 16, 1951, but the evidence is conflicting as to the number and contents of the conversations.

Davis said the number was six. RT 237-245. Two he placed as having occurred over the telephone. One of these, he said, occurred early in February of 1951 and consisted in making an appointment to meet appellant Reynolds at the suggestion of Neider. RT 237. He said the other telephone conversation occurred on March 5, 1951, and that appellant then told him when and where to surrender. RT 242-243. Two conversations, similar in import, and two or three days apart, were placed by Davis as occurring at the Union Club in February of 1951. RT 237-240. At both these conversations, so Davis said, appellant said he was a very close friend of Marshal Carrigan, and for $200 a month payable at the end of each month and for a total payment of $1000, Davis would be placed in the jail at Fairfield (Solano County) with special privileges and it would be a wise move as the Marshal could

help or hurt him. RT 239. Davis said "he agreed to go along with the deal". RT 238. Davis also said that Neider was not present at either of these conversations. RT 406.

According to Davis, a Davis-Reynolds conversation also occurred at the Davis agency around the middle of February of 1951. RT 240. At that time, so he said, appellant Reynolds told him the Supreme Court was about to act unfavorably, prison was impending, the Marshal had changed his plans and Davis would be sent to Santa Rita instead of Fairfield as the Sheriff of Alameda County could do Davis a lot of good, that Davis would be required to surrender in a few days, and appellant Reynolds would tell him when to surrender. RT 240-242.

And the final Davis-Reynolds conversation according to Davis occurred at Santa Rita on March 16, 1951, and as related by Davis was as follows (RT 246):

> "Mr. Reynolds came out to see me and said that Mr. Carrigan was very angry because he had received no money, and I told him I couldn't understand his anger because he was not supposed to receive any money at that point. And he said nevertheless he wanted some money and he wanted it quick, and that there was a train leaving for McNeil Island Penitentiary the following Wednesday, and if he didn't have the $500 immediately, that I would be on it and Mr. Carrigan would pull the rug out from under me. * * * I told him I would let him know."

Appellant testified there were three Davis-Reynolds conversations—two at the Union Club and one at Santa Rita. RT 1204-1205. He was not permitted to testify as to the second conversation at the Union Club. RT 1235-1236. He said he never talked to Davis over the telephone. RT 1205. He said he was never at the Davis agency. RT 1295. And he said he talked to Davis alone at Santa Rita but that Neider was present on the other occasions. RT 1205, 1290.

The first Davis-Reynolds conversation, according to appellant Reynolds, occurred February 10, 1951, at the Union Club. RT 1232. He gave the substance of the conversation as follows (RT 1233-1235):

> "Davis asked what appellant thought could be done about the local situation, and appellant replied he was confident it could be worked out. Davis asked if immediate action could be had, and appellant replied he could get busy within a couple of days and have an answer within a week. Davis said he would advise appellant, as he might be able to serve his imprisonment in the San Mateo County jail."

Incidentally, Davis had been fully aware ever since November of 1949 that the Director of Prisons at Washington alone had authority to approve imprisonment in a local jail, and that such approval, presumably for the San Mateo County jail (San Bruno), had been sought by his attorneys and granted. RT 265-269.

As stated, appellant was not permitted to testify as to the second Davis-Reynolds conversation. RT 1235-1236.

On March 15, 1951, appellant told Neider he was going to southern California to attend a labor convention and he asked Neider to keep an eye on the Union Club in which they were mutually interested. The course of travel south passed by Santa Rita and Neider asked appellant to stop there and see Davis. RT 1243-1244. He did so, and the third Davis-Reynolds conversation occurred at Santa Rita on March 16, 1951. RT 1205, 1248. Appellant testified to the substance thereof as follows (RT 1249-1251):

> "Davis said he was 'scared to death' as he had been told he was about to be moved to McNeil Island, and he asked appellant if he could 'get busy on the matter they had discussed' and see what he could do. Davis asked appellant to telephone Neider and ask him to see Davis right away, and appellant promised to do so."

Neider testified that in February of 1951 he had a conversation with Davis extending over an hour at the Red Boot Cafe across the street from the Davis agency, and that following this conversation he accompanied Davis to the Union Club, introduced him to appellant, and was present at the conversation which ensued. RT 1062-1063. This conversation, as related by Neider, consisted of Davis asking appellant if everything was set and appellant replying in the

affirmative, and some discussion of the Davis appeal. RT 1064-1067.

As stated, the Supreme Court denied the Davis petition for certiorari on Monday, February 26, 1951. On the same day telegraphic notice of the denial was sent by the clerk of the Supreme Court to the attorney representing Davis. RT 1112-1113. Davis was in Detroit attending a convention of automobile dealers on February 26 and 27, 1951. RT 1070. On receipt of the telegraphic notice an associate of Davis' attorney communicated by telephone with the clerk of this court and was advised that in the ordinary course the mandate of the Supreme Court would reach San Francisco somewhere around March 5, 1951, and, in turn, that the mandate of this court would immediately go down to the District Court at Sacramento where an order would be issued to take Davis into custody. RT 1114. Before March 5, 1951, such attorney told Davis and Church of the action of the Supreme Court and the impending surrender of Davis. RT 1114. First by telephone and then in person this attorney communicated with the office of the United States Marshal and discussed the time and place of surrender by Davis and place of imprisonment. RT 1114-1115.

On March 5, 1951, and after telephoning Neider, Davis went to Neider's hotel apartment in San Francisco, rented an adjoining apartment, and remained there until he left there for Oakland to surrender on March 7, 1951. RT 1070. The arrangements for the surrender of Davis on March 7, 1951, and for the time

and place of such surrender, were made by Miss Anderson, the calendar clerk in the office of Davis' attorney. RT 1103-1107. After unsuccessfully trying to locate Davis at his home and at his place of business in Oakland Miss Anderson telephoned this appellant, on whose recommendation Davis had employed such attorney, seeking information as to the whereabouts of Davis. RT 1105. Appellant referred her to Neider as the best source of information. RT 1105. Miss Anderson thereupon telephoned Neider on March 6, 1951, and Neider informed her that Davis was with him. RT 1105-1106. After consulting with Davis (RT 1071-1072), Neider named a time and place for such surrender on March 7, 1951, and Miss Anderson relayed the information to the Marshal's office and obtained approval. RT 1106-1107. Davis surrendered on March 7, 1951, at the time and place thus arranged and approved.

The visit of appellant to Davis at Santa Rita on March 16, 1951, has already been mentioned. After talking to Davis, appellant communicated with Neider and told him Davis wanted to see him. Neider visited Davis at Santa Rita on March 18, 1951. RT 1074, 1077. He had not seen Davis since March 7, 1951. RT 1074. At their conversation on March 18, 1951, Davis told Neider he had heard at Santa Rita he was about to be moved to another jail, and asked Neider to see appellant and have him go through with the arrangements for a local jail through Washington. RT 1079. Neider mentioned the expense of $1000 and

Davis suggested a present payment of $500 with another payment of $500 when Santa Rita or some other local jail was made certain. RT 1079. Neider promised to do so when appellant returned from the south. RT 1080.

On March 19, 1951, Church, the manager of the Davis agency, telephoned Neider and said Davis had instructed him to give $500 to appellant Reynolds. RT 1081. Neider told him to leave the $500 for appellant in an envelope at the Union Club. RT 1081. It was there when appellant returned from the south, and on March 20, 1951, he telephoned Neider asking why the envelope contained only $500 instead of $1000. RT 1181, 1256. Neider explained the contingency proposed by Davis, and appellant stated he though it would be impossible to work it out on that basis, but said he would try. RT 1181-1182, 1256-1257. Appellant conferred with Gaynor on March 20, 1951, and tried to get him to go to Washington on the contingency basis but Gaynor refused and insisted he be paid $1000 before he would leave for Washington. RT 1257-1260, 1406-1409.

The reaction of appellant to the contingency basis proposed by Davis had been communicated by Neider to Church as early as March 20, 1951. RT 1182-1183. Neider then made an appointment for Church to meet appellant, and the meeting occurred on March 23 or 24, 1951, with Neider, Church, and appellant present. RT 1182-1183. This was the first time that Church had ever met appellant. RT 43. The evidence is conflicting as to what was said at the meeting.

As Church has the conversation of March 23 or 24, appellant said that Marshal Carrigan wanted another $500 and he had "enough on the guy" so there would be no further demands, and when Neider asked appellant to try and make a deal, appellant offered to return to Church the $500 he had received, and Church said he had no authority to receive it and would see Davis. RT 42, 47-48, 193-194.

As Neider has the conversation, the proposed contingency arrangement of $500 down and $500 later was discussed, and appellant said, "I saw the man and he won't go for less than $1000", to which Church said he had no authority to pay more than $500, and when Neider suggested that appellant again try to make a deal, appellant said, "You might as well take this $500 back because I can't do anything with it", whereupon Church refused to accept the $500 and said he would talk to Davis. RT 1091-1092.

And as appellant has the conversation, he said, in answer to a question by Neider, "I don't know any more that can be done", and when Neider asked appellant to try again, appellant replied he did not think he could get anyone to go to Washington for $500 as that sum would not even cover expenses, whereupon appellant started to hand to Church the $500 he had received, saying he had no intention of trying to do anything further in the matter, and Church asked appellant to wait until he talked to Davis and that he would telephone appellant the following Monday. RT 1262-1270.

Following the conversation of March 23 or 24, Church talked to Davis. RT 49. On March 26, 1951, a conversation, preceded by an appointment over the telephone, occurred between Church and appellant at the office of appellant in the Labor Temple, no other persons being present. RT 49-50.

Church related the conversation of March 26, 1951, as follows: He asked appellant for the $500 and appellant handed it to him, and Church then said to appellant that Davis had told him to tell appellant (1) to get the $500 back, (2) that if any attempt was made to move Davis the proper authorities would be (or had been) informed, and (3) that a wire would be sent to the Director of Prisons, and appellant then said, "The orders for Mr. Davis' removal were issued yesterday", or "The papers were already made out yesterday". RT 50-51, 203-209.

Appellant related the conversation of March 26, 1951, as follows: Church said, "Well, you haven't been able to do anything more on that matter", and appellant said "no", Church said, "I will take the money", and appellant handed it to him, and as Church was leaving he said, "Phil Davis and I are tired of being pushed around in this matter—if there is any attempt to move Phil Davis or any further trouble caused in this matter, the case has been taken to the FBI and I will take it to Hoover if necessary and if there is any attempt to move him the Marshal will be put in the penitentiary and you can tell him so", to which appellant replied, "If you have any

messages for the Marshal or anything to say to the Marshal do it yourself, because I haven't any dealing with the Marshal". RT 1269-1273.

With the exception of a brief conversation over the telephone between Church and appellant on March 27 or 28, 1951, in which, according to Church, appellant again repeated that he was "all through" (RT 56), there is no evidence in the record that after March 26, 1951, appellant had any contact with the Davis case or any phase thereof.

After leaving appellant's office on March 26, 1951, Church consulted an attorney and the District Attorney of Alameda County, the Sheriff of Alameda County, and the FBI were called in. RT 170. From then on all actions of Davis and Church were directed and supervised by the FBI. From then on the record is concerned with the actions of defendants Carrigan and Calmes under the surveillance of the FBI. The culmination was on April 12, 1951, when Church handed defendant Carrigan the sum of $2000 near 7th and Mission Streets in San Francisco and the FBI apprehended defendant Carrigan with the $2000 in his possession.

SPECIFICATION OF ERRORS RELIED UPON.

1. The court erred in denying appellant's motion for judgment of acquittal.

2. The court erred in instructing the jury as follows:

"Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result." RT 1484/18-22.

* * * * * * *

"Mr. Burns: The only objection, if Your Honor please, for the record is in instruction No. 13 where Your Honor said, 'Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together.' It is my understanding of the law that there has to be concerted action in a conspiracy, and as I indicated before there could be co-existent two separate conspiracies. * * *

"Mr. Gillen: I join in the objection regarding 13, may it please the Court, and the further objection that because of the nature of the evidence here I believe that 13 is also confusing, particularly for the defendant Reynolds, for the reason that Reynolds—the object of the conspiracy might be mistaken. In other words, the defendant Reynolds' object to by a lawful means assist in placing or having Phil Davis retained in a certain place might be misconstrued and confused with the mere object of trying to assist lawfully and for a legitimate purpose. * * * Eleven attempted to cover it, but I don't feel that went far enough." RT 1499/22 to 1501/9.

3. The court erred in instructing the jury as follows:

"Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, you would be justified in the conclusion that such persons were engaged in a conspiracy." RT 1484/3-12.

* * * * * * *

"Mr. Gillen: Eleven attempted to clear it, but I don't feel that went far enough. The same situation, in my humble opinion, exists so far as the defendant Reynolds in Instruction 11, that the purpose or object might be misunderstood." RT 1501/8-12.

4. The court erred in instructing the jury as follows:

"An overt act need not be criminal in nature, if considered separately and apart from the conspiracy; it may be as innocent as the act of a man walking across the street or driving an automobile, or using a telephone. But, if, during the existence of the conspiracy, the overt act is done by one of the conspirators to effect the object of the conspiracy, the crime is complete, and it is complete as to every party found by you to be a member of the conspiracy, no matter which one of the parties did the overt act." RT 1489/8-12.

* * * * * * *

"Mr. Gillen:* * * And also in Instruction No. 23, may it please the Court, which refers to innocent acts which might be overt acts, innocent and innocuous in themselves, for the same reason might be misconstrued as to what is an unlawful object or what is a lawful object." RT 1501/8-17.

5. The court erred in denying appellant's motion for a new trial.

SUMMARY OF ARGUMENT.

Appellant's paramount contention on the appeal is that the judgment against him should be reversed for the reason that it is not supported by substantial evidence. The contention has two aspects. The first aspect is that the general conspiracy alleged in the indictment was not proved. The second aspect is that a separate conspiracy was not proved against appellant.

Appellant also contends that if it be assumed he was convicted of the general conspiracy by evidence proving several conspiracies a reversal of the judgment must also follow for the reason that he suffered substantial prejudice thereby. (*Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L. Ed. 1557; *Canella v. United States,* 9 Cir. 157 F.2d 470.)

A further reason for reversal of the judgment is that erroneous instructions operated to the prejudice of appellant.

Under the circumstances of the case the denial of appellant's motion for a new trial reflects a manifest abuse of discretion.

ARGUMENT.

1. THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED FOR THE REASON THAT IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Specification of Error No. 1. The court erred in denying appellant's motion for judgment of acquittal.

Specification of Error No. 5. The court erred in denying appellant's motion for a new trial.

The indictment charged appellant with being a member of a conspiracy that began January 27, 1951, and ended April 12, 1951. CT 1. And those alleged as conspirators were Phil Davis, John Church, defendant Edward J. Carrigan, defendant Ray Calmes, defendant Sam Neider, and defendant Jack Reynolds (this appellant). CT 1.

The record before the court makes it plain that both ends of the alleged conspiracy chain extended much further than any evidence connecting appellant with the imprisonment phase of the Davis case.

The indictment alleges January 27, 1951, as the beginning of the alleged conspiracy. CT 1. And the first overt act alleged in the indictment is that "On January 27, 1951, said defendant Edward J. Carrigan met said John Church at the Phil Davis Automobile Agency, 2547 E. 14th St., Oakland, California, and they held a conversation together". CT 4.

The episode of January 27, 1951, was the subject of a great deal of conflicting testimony at the trial,

and it had reference to what was said and done on that date when defendant Calmes brought defendant Carrigan into the Davis agency as the prospective purchaser of an automobile. From the testimony of Church it may be inferred that defendant Carrigan unsuccessfully sought to use the veiled threat of his position and influence as United States Marshal to extract from Davis a new automobile for an old one. RT 24-27.

There is no semblance of evidence in the record showing or tending to show that appellant had any connection with the episode of January 27, 1951. To the contrary, the record conclusively shows that appellant's first contact with the imprisonment phase of the Davis case occurred early in February of 1951 at the friendly intercession on behalf of Davis by defendant Neider, a friend and business associate of appellant. On the record, moreover, it conclusively appears that if any conspiracy was formed prior to January 27, 1951, or was formed or existed on that date, it was confined to defendants Carrigan and Calmes, and that neither Davis nor Church nor Neider was party to any conspiracy when, early in February of 1951, appellant's first contact with the imprisonment phase of the Davis case occurred through the friendly intercession of Neider.

The indictment alleges April 12, 1951, as the ending of the alleged conspiracy. CT 1. And the fourth and fifth overt acts alleged in the indictment are that "4. On April 11, 1951, said John Church had a conversa-

tion with said defendant Ray Calmes at said Phil Davis' Automobile Agency", and that "5. On April 12, 1951, on Mission Street between Sixth and Seventh Streets, in the City and County of San Francisco, State of California, about 2:13 o'clock in the afternoon of said day, said defendant Edward J. Carrigan had a conversation with said John Church, and said John Church delivered to the said Edward J. Carrigan the sum of $2000.00 in United States currency, and said Edward J. Carrigan accepted the same". CT 3.

The record is plain, however, as pointed out in the statement of the case herein, that on March 26, 1951, Church told appellant that the FBI had been called in or was about to be called in, and that on that day all connection of appellant with the imprisonment phase of the Davis case was terminated. This termination on March 26, 1951, was confirmed by the testimony of Church (RT 46-50, 156, 162, 178-179, 224), by the testimony of Neider (RT 1187-1189), and by the testimony of appellant (RT 1270-1273). There was no testimony to the contrary.

The FBI was in fact called in by Davis and Church on March 26, 1951. RT 170, 250-251. From then on, the activities of Davis and Church were directed and supervised by the FBI. Therefore, in no sense can it be said that they were *parties* to any conspiracy after March 26, 1951. Nor can it be said that either defendant Neider or appellant was party to any conspiracy after March 26, 1951. Whatever their activi-

ties may have been such activities were on the side of Davis and at his instance and on his behalf, and according to the record all those activities terminated at his request on March 26, 1951. The truth of this as to defendant Neider was recognized by the trial court, for it granted his motion for judgment of acquittal. RT 735-742. It was equally true as to appellant but the trial court failed to recognize its truth, for it denied his motion for judgment of acquittal. RT 735-742.

Other evidence in the record may be referred to as demonstrating that appellant's activities in connection with the imprisonment phase of the Davis case terminated on March 26, 1951. The fact of this termination was tested by the FBI as soon as it was called into the Davis case and assumed the direction and supervision of Davis and Church. Neider testified that he received a telephone message from Church *subsequent to March 26, 1951,* saying that Davis was very worried and wanted to know if Neider could get Reynolds to do something and asked Neider to telephone Reynolds. RT 1189. As to what then occurred Neider testified as follows: "So I called Phil —I mean Reynolds, and I said Church has called me and that Davis was very worried and asked him if he wanted—if there was anything he could do regarding the case, and he said, 'I have washed my hands of the case entirely.' He said, 'I don't want anything to do with Davis or Church either.' And that was

all. So I hung up and called Church immediately back and told him this was the situation and he said, 'Well, what shall I do? Can you do anything?' I said, 'I have no thought on the matter.' And he said, 'Well, what should I do?' And I said, 'Well, I just don't know.' " RT 1189.

And *subsequent to March 26, 1951,* a telephone message was left at appellant's office to the effect that "the man at Santa Rita wants to get in touch with you immediately", and appellant thereupon telephoned Church. RT 1207. As narrated by Church the telephone conversation at that time was as follows: "He told me that his secretary had a call from Santa Rita. He said I was the only one he could think of who might have any connection with Santa Rita, and he asked me if I had been trying to get in touch with him. I said, no, I had not. * * * I told him Mr. Davis was very much upset, angered, and thought he was being very badly abused by all of them. He said, 'As far as I am concerned, I am all through'." RT 55-56.

It is therefore apparent without further argument that the general conspiracy charged in the indictment was not proved against this appellant. As earlier stated, both ends of the alleged conspiracy chain extend much further than any evidence connecting appellant with the imprisonment phase of the Davis case.

There remains for consideration, of course, the question whether a separate conspiracy was proved against appellant. The record contains no evidence that appellant ever talked to or communicated with defendant Carrigan or defendant Calmes about the Davis case at any time. The entire case against appellant rests entirely on admissions or declarations ascribed to appellant by Davis and Church, alleged co-conspirators, in conversations they had with him commencing early in February of 1951 and ending on March 26, 1951. The case, therefore, is peculiarly one for an application of the general rule that in conspiracy cases the corpus delicti cannot be proved by the admissions or declarations of a defendant. *Colt v. United States,* 5 Cir. 160 F. 2d 650, 651; *Tabor v. United States,* 4 Cir. 152 F. 2d 254, 257; *United States v. Di Orio,* 3 Cir. 150 F. 2d 938, 940; *Ryan v. United States,* 8 Cir. 99 F. 2d 864, 869.

Fairly summarized, the testimony of Davis was that on or about February 10, 1951, appellant said he was a good friend of Marshal Carrigan and that for $200 a month Davis would be placed in the Solano County jail (Fairfield) with special privileges and it would be a wise move for Davis as the Marshal could help or hurt him, and Davis said he would "go along" with the deal; that later in February appellant said the Marshal had changed the plans and Davis would be sent to Santa Rita instead of Fairfield; that on March 5, 1951, appellant told Davis

when and where to surrender; and that on March 16, 1951, appellant told Davis the Marshal was angry because he had received no money and Davis would be sent to the McNeil Island penitentiary the following Wednesday (March 21) if $500 was not paid immediately. And fairly summarized, the testimony of Church was that on March 23 or 24, 1951, appellant offered to return to Church the $500 he had received and said the Marshal wanted another $500, and he had "enough on the guy" so there would be no further demands; and that on March 26, 1951, appellant returned the $500 to Church, and when Church told appellant the matter had been placed or would be placed in the hands of the FBI appellant said an order for the removal of Davis had been issued the day before (March 25).

Before these conversations are discussed some of their background must be developed. The record is undisputed that early in February of 1951 Neider made the initial contact with appellant respecting the imprisonment phase of the Davis case. Both Neider and appellant testified that their discussions and conversations always had reference to a plan whereby a representative was to go to Washington on behalf of Davis, at an expense of $1000, and there present to the Director of Prisons in person a proper application and showing and obtain from the Director of Prisons authorization for imprisonment of Davis in a local jail. There was nothing unlawful in this. It

is common and proper practice and procedure according to the testimony of the Director of Prisons. RT 731, 733. As a matter of fact such authorization had been obtained from the Director of Prisons as early as November 30, 1949. Although Davis was fully aware of this he never communicated the fact to Neider or appellant at any time. When this authorization was received by the local office of the United States Marshal it was placed in the files by John Roseen, the chief deputy and then acting United States Marshal, and he did not call it to the attention of Marshal Carrigan, who was appointed in August of 1950, until March 5, 1951. RT 489-490. This authorization was never revoked. RT 456. It required the consent of the local United States Attorney, and that was not obtained until March 5, 1951. RT 450. Without such authorization from the Director of Prisons and such consent by the local United States Attorney, Davis could not have been committed to a local jail. RT 463-464. Once there, he could not be transferred to McNeil Island without specific authorization from the Director of Prisons. RT 515.

The Alameda County jail was an accredited jail for Federal misdemeanor prisoners. RT 464. And Alameda County was where Davis and his family lived and where his business was located. In normal course a Federal misdemeanor prisoner committed to the Alameda County jail would be placed by the Sheriff of that county in the branch at Santa Rita.

RT 660. The Sheriff of Alameda County did not tolerate special privileges for such prisoners. RT 654-655. Appellant was told this by the Sheriff before Davis was committed to the Alameda County jail. RT 654-655. There was nothing unlawful in thus committing Davis. The time and place for the surrender of Davis was arranged with the Marshal's office by the office of the attorney representing Davis in the certiorari proceeding and imprisonment for Davis in a local jail discussed. RT 1104-1107, 1113-1114. This was after the office of such attorney had told Davis and Church that the petition for certiorari had been denied and Davis would have to surrender. RT 1114.

When appellant visited Davis at Santa Rita on March 16, 1951, appellant was on his way south to a labor convention. Davis was aware of this. RT 427. Appellant did not return to Oakland until March 19, 1951, and the $500 which Church had left for him in his absence did not come into appellant's possession until late that afternoon. RT 1253-1255. The record shows that Marshal Carrigan left San Francisco for the east at 8:40 a.m. of March 19, 1951, and did not return to San Francisco until after Wednesday, March 21, 1951. RT 495-496. Between March 19, 1951, and March 21, 1951, appellant told Neider that $500 was not enough and that $1000 would be necessary, and confirmed the inadequacy by talking to the representative it was proposed to send to Washington on behalf of Davis. RT 1253-1257. Defendant Calmes left for Honolulu on March 24, 1951,

and did not return to San Francisco until April 4, 1951. RT 973. There was no attempt to move Davis from Santa Rita to another jail until after March 26, 1951, and until after Church had told appellant the FBI had been called in or would be called in in the Davis case.

The background above developed utterly destroys any contention the appellee might make that the corpus delicti was established by independent proof corroborating the admissions or declarations ascribed to appellant by Davis and Church.

In essence, the case against appellant from the Davis-Reynolds and Church-Reynolds conversations is that early in February of 1951 Davis and Church conspired with appellant to pay the United States Marshal, through appellant, the sum of $200 at the end of each month for imprisonment of Davis in the Fairfield jail with special privileges, that later in February of 1951 the Santa Rita jail was substituted for the Fairfield jail by the Marshal, that around March 16, 1951, the Marshal, through appellant, demanded from Davis the immediate payment of $500 or Davis would be sent to McNeil Island on March 21, 1951, that on March 19, 1951, Davis, through Church, paid this $500 to appellant for the Marshal, that between March 19 and March 22, 1951, the Marshal, through appellant, demanded another $500 from Davis, that on March 23 or 24, 1951, Davis, through Church, refused to pay another $500, and

that on March 26, 1951, appellant returned the original $500 to Church.

It appears from the record, however, that special privileges, if any, in local jails would come from the Sheriff having custody of a Federal misdemeanor prisoner and not from the United States Marshal; that authorization from the Director of Prisons, Washington, was required before such prisoner could be imprisoned in a local jail; that up to March 5, 1951, neither the Marshal nor appellant was aware that such authorization had been given in the Davis case; that the traveling schedules of the Marshal and appellant precluded their meeting between March 16, 1951, and March 22, 1951; that before March 21, 1951, appellant had told Neider that the $500 left by Church at appellant's place of business during his absence, on March 19, 1951, was inadequate for the expenses of the proposed representative to Washington; that the original $500 was returned by appellant to Church on March 26, 1951, and appellant's connection with the imprisonment phase of the Davis case terminated; and that all efforts of the Marshal to move Davis to another jail occurred after March 26, 1951.

Thus it is apparent that the independent evidence not only fails to corroborate the admissions and declarations ascribed to appellant by Davis and Church, but it has the effect of discrediting or nullifying their testimony that such admissions and declarations were made by appellant. Manifestly, a separate conspiracy was not proved against appellant.

On the record, then, the judgment against appellant should be reversed for the reason that it is not supported by substantial evidence. The insufficiency of the evidence was challenged by appellant's motion for judgment of acquittal and by his motion for new trial. It is plain error available to him on appeal regardless of challenge or want of challenge in the trial court. *Lockhart v. United States,* 4 Cir. 183 F. 2d 265, 266; *United States v. Norton,* 2 Cir. 179 F. 2d 527, 528; *United States v. Renee Ice Cream Co.,* 3 Cir. 160 F. 2d 353, 355; Rule 52 (b), Federal Rules of Criminal Procedure.

If it be assumed, however, that appellant was convicted of the general conspiracy by evidence proving several conspiracies a reversal of the judgment must also follow for the reason that appellant suffered substantial prejudice thereby. *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557; *Canella v. United States,* 9 Cir. 157 F. 2d 470.

Earlier evaluation of the evidence has demonstrated that both ends of the alleged conspiracy chain extended much further than any evidence connecting appellant with the imprisonment phase of the Davis case. From the state of the record these inevitable conclusions are prompted: *First,* if a conspiracy was formed or existed on or prior to January 27, 1951, it was formed by defendants Carrigan and Calmes with the objective of extracting from Davis a new automobile for defendant Carrigan's old one, and it ended in frustration on January 27, 1951, without

having been joined by any of the others named in the indictment as conspirators; *second,* if a conspiracy existed after January 27, 1951, it was formed by those named in the indictment as conspirators other than defendants Carrigan and Calmes with the objective of paying money to defendant Carrigan or some other person or persons in return for placing Davis and keeping him placed in a local jail and it ended in frustration on March 26, 1951; *third,* if any conspiracy existed after March 26, 1951, to pay defendant Carrigan $2000, it was formed at the instance of Davis and Church acting under the direction and supervision of the FBI and it included defendants Carrigan and Calmes but did not include defendants Neider and Reynolds and it ended on April 12, 1951, with the payment of $2000 to defendant Carrigan under the direction and supervision of the FBI.

Viewed in the foregoing light the case against appellant would unquestionably call for an application of the principles announced and applied by the Supreme Court in the Kotteakos case and followed and applied by this court in the Canella case on the authority of the Kotteakos case. This case would fall squarely within the principles of those cases, for it would be obvious that appellant was convicted of the general conspiracy by evidence proving several conspiracies and there was a fatal and prejudicial variance between the allegations of the indictment and the proof. Those cases would demand a reversal of the judgment of conviction against appellant in this case.

In closing the branch of the argument challenging the sufficiency of the evidence appellant respectfully urges that from whatever aspect the evidence may be viewed his conviction reflects a miscarriage of justice and the judgment against him should therefore be reversed.

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2. THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED FOR THE REASON THAT ERRONEOUS INSTRUCTIONS OPERATED TO HIS PREJUDICE.

Specification of Error No. 2. The court erred in instructing the jury as follows:

"Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result." RT 1484/18-22.

"Mr. Burns: The only objection, if Your Honor please, for the record is in instruction No. 13 where Your Honor said, 'Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together.' It is my understanding of the law that there has to be concerted action in a conspiracy, and as I indicated before there could be co-existent two separate conspiracies. * * *

"Mr. Gillen: I join in the objection regarding 13, may it please the Court, and the further objection that because of the nature of the evidence here I believe that 13 is also confusing, particularly for the defendant Reynolds, for the reason that Reynolds—the object of the conspiracy might be mistaken. In other words, the defendant Reynolds' object to by a lawful means assist in placing or having Phil Davis retained in a certain place might be misconstrued and confused with the mere object of trying to assist lawfully and for a legitimate purpose. * * * Eleven attempted to cover it, but I don't feel that went far enough." RT 1499/22 to 1501/9.

Specification of Error No. 3. The court erred in instructing the jury as follows:

"Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, you should be justified in the conclusion that such persons were engaged in a conspiracy." RT 1484/3-12.

"Mr. Gillen: Eleven attempted to clear it, but I don't feel that went far enough. The same situation, in my humble opinion, exists so far as the defendant Reynolds in Instruction 11, that the purpose or object might be misunderstood." RT 1501/8-12.

Specification of error No. 4. The court erred in instructing the jury as follows:

"An overt act need not be criminal in nature, if considered separately and apart from the conspiracy; it may be as innocent as the act of a man walking across the street or driving an automobile, or using a telephone. But, if, during the existence of the conspiracy, the overt act is done by one of the conspirators to effect the object of the conspiracy, the crime is complete, and it is complete as to every party found by you to be a member of the conspiracy, no matter which one of the parties did the overt act." RT 1489/8-12.

"Mr. Gillen: * * * And also in Instruction No. 23, may it please the Court, which refers to innocent acts which might be overt acts, innocent and innocuous in themselves, for the same reason might be misconstrued as to what is an unlawful object or what is a lawful object." RT 1501/8-17.

There was evidence before the jury in this case from which it could competently find that appellant's connection with the imprisonment phase of the Davis case covered a period much shorter than the indictment alleged and that during such period he lawfully pursued by lawful means the objective of having Davis imprisoned in a local jail and retained there. Yet under the instructions above challenged the jury was authorized to convict appellant of the general con-

spiracy although his own acts were innocent and lawful, if during such period others were unlawfully pursuing the same objective by unlawful means. Moreover, the challenged instructions authorized the jury to convict appellant of the general conspiracy on evidence of the overt acts of others occurring at any time during the period alleged in the indictment.

And if it be assumed that on the evidence before it the jury could competently find that there were several conspiracies instead of the one general conspiracy alleged, then the challenged instructions authorized the jury to convict appellant of the general conspiracy on evidence proving the several conspiracies and to impute to him the acts and statements of others in furtherance of a separate conspiracy wherein appellant was in no way involved.

It is enough to again invoke the Kotteakos case and the Canella case to demonstrate that the challenged instructions operated to the prejudice of appellant and require a reversal of the judgment.

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3. **THE JUDGMENT AGAINST APPELLANT SHOULD BE REVERSED FOR THE REASON THAT DENIAL OF HIS MOTION FOR NEW TRIAL WAS A MANIFEST ABUSE OF DISCRETION ON THE PART OF THE TRIAL COURT.**

Specification of Error No. 5. The court erred in denying appellant's motion for a new trial.

Appellant moved for a new trial on grounds asserting the insufficiency of the evidence and error in the jury instructions. RT 154-156. The motion was denied and judgment and commitment followed. RT 168-169.

From arguments that have preceded it is obvious that the motion for new trial should have been granted, and that its denial reflects a manifest abuse of discretion requiring a reversal of the judgment.

CONCLUSION.

Appellant therefore respectfully submits that the judgment against him should be reversed.

Dated, San Francisco,
February 11, 1952.

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